

MISSISSIPPI SUPREME COURT

NO. 2013-CA-369

LACIE CYLESS SMITH

APPELLANT

VS.

**EXPRESS CHECK ADVANCE
OF MISSISSIPPI, LLC**

APPELLEE

REPLY OF APPELLEE IN OPPOSITION TO REHEARING

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STATEMENT OF THE CASE

On October 2, 2014, this Court affirmed the ruling of the Honorable Lee. J. Howard in Clay County Circuit Court compelling arbitration. Aggrieved by this Court's decision, Appellant filed her Petition for Rehearing on October 29, 2014. The arguments in the Petition for Rehearing raise issues already disposed of in this Court's October 2, 2014 opinion. Pursuant to Miss. R. App. P. 40, a Motion for Rehearing,

... shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended and shall contain such argument in support of the motion as movant desires to present. The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court. Oral argument in support of the motion will not be permitted.

Appellant requested oral argument which is not permissible under the rule. Additionally, Appellant raises a number of issues already considered (and disposed of) by this Court and Appellant's Petition for Rehearing should be denied.

SUMMARY OF THE ARGUMENT

Appellant's first argument that the majority opinion is inconsistent with this Court's opinions in *East Ford, Inc. v. Taylor*, 826 So.2d 709 (Miss. 2002) and *Caplin Enterprises, Inc. v. Arrington*, 145 So.3d 608 (Miss. 2014) ignores the fact that this Court's majority opinion cited *East Ford* and the dissent cited to *Arrington*. Both of the aforementioned cases were considered and the majority of this Court affirmed the trial court.

Appellant's second argument deals with a waiver of the constitutional right to a trial by jury. This point is moot as the plain language of the arbitration provision waives the right to a jury trial and this Court was not presented with evidence that Appellant "didn't know what she signed, did so involuntarily, or lacked an opportunity to review and inquire about the terms.

[Appellant] admitted that she had signed the document.” *Smith v. Express Check Adv. of Mississippi, LLC*, 2013-CA-00369-SCT, 2014 WL 4923169, at *6 (Miss. Oct. 2, 2014).

Appellant’s third argument, that the arbitration agreement should be declared unenforceable because Appellant does not have the financial means to share in the cost of an arbitrator has likewise been foreclosed by Miss. R. App. P. 40 as this argument is repetitious of her previous argument.

ARGUMENT

I. Appellant Has Not Satisfied Her Burden Under Mississippi Rule of Appellate Procedure 40(a) and Therefore Rehearing Should Be Denied

Pursuant to Miss. R. App. P. 40, a Motion for Rehearing,

... shall state with particularity the points of law or fact which, in the opinion of the movant, the court has overlooked or misapprehended and shall contain such argument in support of the motion as movant desires to present. The motion for rehearing should be used to call attention to specific errors of law or fact which the opinion is thought to contain; the motion for rehearing is not intended to afford an opportunity for a mere repetition of the argument already considered by the court. Oral argument in support of the motion will not be permitted.

The plain language of Rule 40 forecloses Appellant’s Petition for Rehearing as it merely recites prior argument that this Court has already considered and decided. “The purpose of a petition for rehearing is to call attention to specific errors of fact or law which this Court has either overlooked or misapprehended.” *Brandau v. State*, 662 So. 2d 1051, 1053 (Miss. 1995). No actual new points of law or fact are set forth in Appellant’s Petition as required by Miss. R. App. P. 40(a).

The only relatively new case cited by Appellant is the case of *Caplin Enterprises, Inc. v. Arrington*, 145 So. 3d 608 (Miss. 2014). *Arrington* was decided on May 18, 2014, four months and fourteen days before the instant case was affirmed. Appellant attempts to rely on *Arrington*, as cited to in Justice King’s dissent, because “[Appellant] was so desperate for a job that she

signed an unreasonably unfavorable agreement to obtain much-needed employment.” *Express Check*, 2014 WL 4923169, at *9. As the majority held however, there is no evidentiary support for this position, and further, it is clear from the majority’s holding that it has not overlooked or misapprehended *Arrington*, but instead found support in that case lacking.

In her Petition for Rehearing, Appellant relies on additional cases and argument previously found in her Brief of Appellant and Reply Brief of Appellant and this Court need not revisit “argument already considered by the court.” Miss. R. App. P. 40(a). As such, this issue is without merit.

II. Appellant Waived Her Right to a Jury

Appellant’s argument that this Court did not address “[Appellant’s] claim that she has not validly waived her constitutional right to trial by jury” misses the point. The plain language of the arbitration provision specifically set forth that the “Associate understands that he/she is waiving the right to a jury trial...” *Express Check*, 2014 WL 4923169, at *1. It is clear that through its analysis, the Court has already considered Appellant’s argument. The Court found Appellant was provided with “substantial notice that she was agreeing to forego any right to judicial review.” *Id.* at * 6. This Court further stated:

What is more, Smith failed to produce any evidence that she didn't know what she signed, did so involuntarily, or lacked an opportunity to review and inquire about the terms. Smith admitted that she had signed the document. And while she testified that no one had told her to read the document or explained its terms, she conceded that she could have read it. The law imposes a duty on a contracting party to read what he or she signs.¹ Further, Smith never asked any questions about the document she signed. Simply put, Smith bore the burden to establish these facts, and she failed to do so.

Id. This issue is without merit.

¹ *McKenzie Check Advance of Ms., LLC v. Hardy*, 866 So.2d 446, 455 (Miss.2004).

III. Appellant's "Financial Means" Argument Has Been Considered by the Court

Appellant's third argument repeats, almost verbatim, the argument and cases cited in her Appellant's Brief. As stated *supra*, Miss. R. App. P. 40 does not allow for merely restating argument that has been considered by this Court. Appellant's third argument is exactly the type of repetitious argument Rule 40 contemplates. It is clear that this Court considered this argument, as stated here, "... [Appellant] bears the burden to show that the agreement is unconscionable, and, although she testified to her limited financial means, [Appellant] failed to present any evidence of the costs of arbitration. Without that evidence, we cannot say that costs prohibit [Appellant] from pursuing arbitration." *Id.* at *5. Therefore, this contention is without merit.

CONCLUSION

Appellant's Petition for Rehearing is meritless and merely restates argument already considered by this Court in the October 2, 2014 opinion. As Miss. R. App. P. 40 is not intended "to afford an opportunity for a mere repetition of the argument already considered by the court," this Petition for Rehearing should be denied.

RESPECTFULLY SUBMITTED, this the 4th day of November, 2014.

EXPRESS CHECK ADVANCE OF MISSISSIPPI, LLC, Appellee

By: /s/ J. TUCKER MITCHELL

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CERTIFICATE OF SERVICE

I, J. Tucker Mitchell, attorney for Defendant/Appellee Express Check Advance of Mississippi, LLC, do certify that I have this day electronically filed the foregoing **REPLY OF APPELLEE IN OPPOSITION TO REHEARING** with the Clerk of the Court using the MEC system, which sent notification of such filing to the following:

Jim Waide, Esq. / Ron Woodruff, Esq.
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And sent by U.S. Postal Mail, postage prepaid, to the following:

Honorable Lee J. Howard
c/o Carrie Kimbrough
Court Administrator
P.O. Box 1679
Starkville, Mississippi 39760

This the 4th day of November, 2014.

/s/ J. TUCKER MITCHELL
J. TUCKER MITCHELL